NG HONG CHAI

v.

TEOK AH KOW

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: 22-354-1998]
18 MARCH 1999

CIVIL PROCEDURE: *Summary judgment - Summary judgment granted on counterclaim - Whether proper - No defence to counterclaim - Whether respondent had unfettered right to apply for summary judgment - Rules of the High Court 1980, O. 14 r. 5(1)*

CONTRACT: *Loan - Friendly loan - Claim for repayment - Cheques handed for repayment of loan but which later bounced - Whether proof that a contract was intended - Whether claimant entitled to repayment*

The Deputy Registrar ('DR') gave a summary judgment in favour of the respondent on his counterclaim. The appellant filed a summons-in-chambers in encl. 25 seeking to set aside the order of the DR and to stay the proceedings pending the disposal of the said application. The Senior Assistant Registrar ('SAR') dismissed encl. 25 with costs. Hence, the present appeal.

The respondent claimed that he had given the appellant a friendly loan in the sum of RM300,000 that was not repaid. It was also claimed that the appellant had given the respondent four cheques to settle the loan but that the said cheques had bounced when they were presented for payment. The appellant deposed that the respondent did not send a single notice in regard to repayment of the loan and that the respondent merely filed the counterclaim after the appellant had activated his writ action against the respondent.

Held:

[1] There was an oral contract between the appellant and the respondent. The appellant was liable not because he had made a promise but because he had made a bargain. As a contracting party, the appellant was bound when he accepted the sum of RM300,000 from the respondent. Further, the appellant had handed four cheques to the respondent for repayment. An agreement is not a mental state but rather an act. The court can make the necessary inference from conduct.

[2] There was no defence to the counterclaim at all. The four cheques bounced and by supplying those cheques the appellant knew that he owed the respondent on the basis of a friendly loan a sum of RM300,000. Order 14 r. 5(1) Rules of the High Court 1980 gives an unfettered right to the respondent to apply for summary judgment on the counterclaim.

[3] The SAR was right when he dismissed encl. 25 with costs. There was no necessity to set aside the order of the DR. What the DR did was allowable in law. There was no material at all to show that there was a defence to the counterclaim. Likewise there was no material at all to set aside the order of the DR. The appellant also did not affirm a single affidavit in support in seeking to set aside the order of the DR. In matters where disputed questions of facts are involved, it would be prudent for the parties and not their solicitors or any one else to affirm affidavits relating thereto.

[4] There were no special circumstances to stay the proceedings. The respondent was entitled to enjoy his success.

[Appeal dismissed.]

Case(s) referred to:

Anon [1477] YB Edw 4 ***(refd)***
Baltim Timber Sdn Bhd v. Director of Forests & Ors [1996] 4 MLJ 103 ***(refd)***
Centrovincial Estates pk v. Merchant Investors Assurance Co Ltd [1983] Com LR 158 ***(refd)***
Daiman Development Sdn Bhd v. Mathew Lui Chin Teck & Anor Appeal [1981] 1 MLJ 56 ***(refd)***
Drayton Giftware Ltd v. Varyland Ltd [1982] 132 NLJ 558 ***(refd)***
Hing Moh Sdn Bhd v. Perdana – CMCC Sdn Bhd [1994] 4 CLJ 128 ***(refd)***
Home and Overseas Insurance Co Ltd v. Mentor Insurance Co (UK) Ltd (In Liquidation) [1990] 1 WLR 153 ***(refd)***
Million Group Credit Sdn Bhd v. Lee Shoo Khoon & Ors [1986] 1 MLJ 315 ***(refd)***
MN Guha Majumder v. RE Donough [1974] 2 MLJ 114 ***(refd)***
Overseas Investment Pte Ltd v. Anthony William O'Brien & Anor [1988] 3 MLJ 332 ***(refd)***
Packirisamy v. Janagi [1970] 2 MLJ 202 ***(refd)***
Rann v. Hughes [1778] 7 TR 350 ***(refd)***
Re Haji Mohamed Eusoff, Decd. Kok Su Win v. Ng Koon Mee [1981] 2 MLJ 77 ***(refd)***
Sri Kajang Rock Products Sdn Bhd v. Mayban Finance Bhd [1992] 1 CLJ 204 ***(refd)***
Wu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) v. Raja Zainal Abidin Raja Hussin & Anor [1995] 3 MLJ 224 ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 2(e), (h), 3
Rules of the High Court 1980, O. 14 r. 5(1)

For the appellant - Awtar Singh Surat Singh; M/s A Singh & Partners
For the respondent - Gan Jui Chui; M/s Gan & Lim

Reported by Usha Thiagarajah

JUDGMENT

Abdul Malik Ishak J:

By way of a summons in chambers, the respondent filed an O. 14 application for summary judgment against the appellant for a sum of RM300,000 together with interest at the rate of 8% per year calculated from 28 July 1998 till date of full payment, costs, and other relief as the court deems fit. The summons in chambers can be seen in encl. 11 and it was fixed for hearing before the learned deputy registrar ("DR") on 2 November 1998. Enclosure 11 was supported by an affidavit of the respondent himself who affirmed that affidavit on 28 August 1998 and this very affidavit can be seen in encl. 10. It must be borne in mind that encl. 10 was filed on 29 August 1998 and there the respondent deposed that the appellant was indebted to him in the sum of RM300,000 by way of a friendly loan – that sum was said to be given by the respondent to the appellant on the request and at the behest of the appellant himself. It was deposed that the appellant handed to the respondent four cheques of Hong Leong Bank Berhad to settle that friendly loan and the details of those cheques were itemised in the following fashions:

Dates	Details of HLBB	Amounts
25 July 1997	503970	RM100,000
25 July 1997	503971	RM100,000
25 July 1997	503973	RM 50,000
25 July 1997	503974	RM 50,000
		RM300,000

On receipts of these four cheques, the respondent must have been thrilled and excited. It was short-lived. When the respondent presented these four cheques for payment on 28 July 1998, they bounced. The caption "account closed" was clearly embossed on each of these four cheques. In fact, the words "account closed" were embossed in a stamp chop fashion twice on each of these four cheques as can be seen in exhibits marked 'A', 'B', 'C', and 'D' of encl. 10. It was deposed that the respondent repeatedly requested the appellant to repay back the friendly loan but it was to no avail. The appellant simply played possum. The respondent held onto the view that the appellant will continue to refuse to pay the friendly loan amounting to RM300,000 unless there was

an order of the court ordering the appellant to pay up that amount. On these simple facts, the respondent believed that the appellant had no defence whatsoever and, consequently, the respondent prayed that summary judgment be handed down against the appellant for that sum, together with interest and costs.

The appellant responded by way of an affidavit in reply in encl. 15 that was affirmed on 23 September 1998 and filed on the next day. In encl. 15, the appellant disputed and denied that he was indebted to the respondent in the sum of RM300,000. The appellant referred to the four cheques as exhibited and marked as "A", "B", "C" and "D" of encl. 10 and he laid emphasis on the following points: these four cheques bore the same date, namely, 25 July 1997, and that very date was rubber stamped on these cheques whereas the value of each of the four cheques was handwritten with a pen. Using this as a leverage, the appellant held onto the notion that what he had said in his defence to the counterclaim was true in that the four cheques were given to the respondent without a date written on it. The appellant too disputed that he had given the four cheques to the respondent in order to settle his debt and the appellant deposed that the respondent did not exhibit any loan agreement nor did the respondent say when did the parties enter into that loan agreement. This very fact, so said the appellant, was indicative that there was a triable issue to the whole episode. In regard to the averment that the four cheques bounced, the appellant questioned the delay of one year on the part of the respondent to seek the reimbursement of that friendly loan bearing in mind that those cheques were dated 25 July 1997. The appellant too disputed and disagreed that the respondent had requested for the repayment of the friendly loan. The appellant deposed that the respondent did not send a single notice in regard to the repayment of that loan and that the respondent merely filed that counterclaim after the appellant had activated the writ action against the respondent. The appellant disputed and disagreed that the appellant would continue to fail and/or refuse to settle the friendly loan unless there was a court order. The appellant deposed that the counterclaim of the respondent was made in bad faith and it should be dismissed with costs and the appellant be given the opportunity to defend the case. For these reasons, the appellant was of the view that there were triable issues and the case should proceed to full trial and the appellant was also of the view that encl. 11 should be dismissed with costs.

On receipt of encl. 15, the respondent responded swiftly and he filed encl. 17. It must be emphasised that encl. 17 was affirmed on 7 October 1998 and filed on the same day. Enclosure 17 carried the caption "afidavit defendan (No. 2)". In that affidavit, the respondent deposed that what he affirmed was the truth and it emanated from his personal knowledge save as otherwise

stated. After referring to the summons in chambers in encl. 11 together with the relevant affidavits in encls. 10 and 15, the respondent deposed that the appellant failed to disclose as to why the appellant had given the four cheques of Hong Leong Bank Bhd to the respondent marked as exhs. 'A', 'B', 'C', and 'D' and exhibited in the affidavit in encl. 10. The respondent deposed, and he was quite categorical, that the four cheques were dated 25 July 1997, and he said that he did not know and had no knowledge that the appellant's bank account had been closed in 1995. The respondent continued that he would not have accepted cheques from an account that had been closed. In regard to the averments in paras. 4 and 5 of encl. 15, this was what the respondent had to say:

(1) that he did not insist that the appellant signed any agreement since he knew the appellant for more than ten years; and the appellant was said to be the respondent's remisier;

(2) once he discovered that the four cheques of Hong Leong Bank Bhd were worthless, he had requested the appellant to repay the loan of RM300,000;

(3) the appellant then requested the respondent to give him time to settle the debt.

To reply to para. 6 of the affidavit of the appellant in encl. 15, the respondent exhibited a letter from his solicitors Messrs Gan & Lim, a very senior law firm, dated 12 June 1998 marked as exh. 'E' and that letter was worded thus:

GAN & LIM
Advocates & Solicitors
Notary Public
Commissioner For Oaths
Registered Patent Agent
No. 61, Jalan Tan Hiok Nee
80000 Johor Bahru, Johor
Tel: 07-2230877
Fax: 07-2244325

12th June 1998

Your Ref: ASP/1753/98/L/g

Our Ref: GKS/DS/C 98194

M/s A. Singh & Partners
Advocates & Solicitors
Suite 324, 3rd Floor, Pan Global Plaza
Jalan Wong Ah Fook
80000 Johor Bahru

Dear Sir

Re: Demand for RM637,659.84

We act for Mr Teok Ah Kow @ Cheong Chan.

Our client has handed your letter dated 30-5-1998 to us with instructions to reply thereto.

In respect of the alleged sale of Polypulp Industries Bhd. shares by your client to our client, please let us have full particulars of such sales for the period from 1991 to 1997, including:

(a) contract numbers and dates for each and every alleged sale (b) the mode of payments.

Since your client alleges that our client paid for the said shares by two (2) cheques, please let us have the particulars of the other cheque, that is the drawee bank, cheque number, the amount, date and to whom was it paid.

Our client would also like to know who was this Yap Moi and how was she related to your client; and also who was this Kee Hang and what part did he play in these alleged transactions.

We have our client's express instructions to deny that he owes your client the said sum of RM637,659.84 or any sum at all.

In fact our client has lent your client an aggregate sum of RM300,000.00 and for purported repayment of the same, your client had issued four (4) cheques on Hong Leong Bank Berhad, cheques No. 503970, 503971, 503973 and 503974.

When our client banked in the 4 cheques, they were returned with the remark "A/C Closed".

As solicitors for our client, we now demand of your client to pay to us the said sum of RM300,000.00 within the next seven (7) days, failing which we have instructions to institute legal action against your client for the recovery of the said sum RM300,000.00 plus interest at 15% p.a. and costs.

Yours faithfully

Sgd.

c.c. client

The respondent denied that the counterclaim was made in bad faith and the respondent verily believed that the appellant had no defence to the counterclaim and that there was no issue to be tried and, consequently, the respondent prayed that his O. 14 application in encl. 11 be allowed.

It must be highlighted that there was no reply to encl. 17. This meant that encl. 17 stood alone, unchallenged and all the averments therein must be deemed to be admitted. As Shankar J (as he then was) once said in *Overseas Investment Pte Ltd v. Anthony William O'Brien & Anor* [1988] 3 MLJ 332 particularly at p. 333 to p. 334:

> The plaintiff did not file any affidavit to contradict the affidavits filed by the claimant. Where a case is to be decided on a contest of affidavits, the rule is clear. Material allegations which are not contradicted are deemed to be admitted: see *Tynte v. Buller* [1854] 23 LJ Ch 504; 2 WR 309.

It was quite obvious that the respondent filed the O. 14 application to enable him to obtain a quick judgment when there was plainly no defence to the Counterclaim (*Home and Overseas Insurance Co Ltd v. Mentor Insurance Co (UK) Ltd (In Liquidation*) [1990] 1 WLR 153, 158).

Order 14 r. 5(1) of the Rules of the High Court 1980 ("RHC") states as follows:

> Where a defendant to an action begun by writ has served a counterclaim on the plaintiff, then, subject, to paragraph (3), the defendant may, on the ground that the plaintiff has no defence to a claim made in the counterclaim, or to a particular part of such a claim, apply to the Court for judgment against the plaintiff on that claim or part.

and it gives the respondent the right to seek a summary judgment on the counterclaim. Obviously this rule enables the respondent who has a counterclaim against the appellant and, where there is no defence to the counterclaim, the respondent is not compelled to begin a separate action in order to apply for summary judgment.

The date of the hearing of encl. 11 that was scheduled to be heard by the learned DR on 2 November 1998 was relayed to the appellant's counsel by letter dated 7 October 1998 and this very letter was exhibited and marked as exh. "TAK 1" of encl. 33 and it was worded thus:

> GAN & LIM
> Advocates & Solicitors
> Commissioner For Oaths
> Registered Patent Agent
> No. 61, Jalan Tan Hiok Nee
> 80000 Johor Bahru, Johor
>
> Ruj. Kami: GJC/DS/C 98194 7hb Okt. 1998
>
> Penolong Kanan Pendaftar
> Mahkamah Tinggi Malaya
> Johor Bahru

Tuan

Per: Mahkamah Tinggi Johor Bahru Guaman Sivil No. 22-354-1998 (1)

Dengan hormatnya kami merujuk kepada perkara di atas.

2. Kami bersukacita mengemukakan bersama-sama ini sesalinan Afidavit Defendan (No. 2) yang diikrarkan oleh Teok Ah Kow @ Cheong Chan pada 7hb Oktober 1998 untuk difailkan.

3. Wang tunai/cek HBMB 661729 sebanyak RM8.00 dan Borang presipi mahkamah disertakan bersama.

4. Sekian, terima kasih.

Yang benar

Sgd.
Kemb.

s.k. Tetuan A. Singh & Partners
Peguambela & Peguamcara
Suite 324, 3rd Floor
Pan Global Plaza, Jalan Wong Ah Fook
80000 Johor Bahru
Ruj: Tuan: ASP/1753/98/L/G/SETASIDE)

Sesalinan Afidavit Defendan (No.2) dilampirkan bersama-sama ini sebagai penyampaian kepada tetuan.

A. Singh & Partners

Sgd. 7/10/98

On 2 November 1998 when the case came up for hearing before the learned DR, Miss Gan Jui Chui appeared for the respondent while the appellant and his counsel were absent. The learned DR gave summary judgment in favour of the respondent and the order was worded thus:

DALAM MAHKAMAH TINGGI MALAYA DI JOHOR BAHRU
GUAMAN SIVIL NO. 22-354 OF 1998 (1)

ANTARA

NG HONG CHAI … PLAINTIF

DAN

TEOK AH KOW @ CHEONG CHAN … DEFENDAN

DALAM KAMAR PADA 2HB NOVEMBER 1998 DI HADAPAN TUAN CHE MOHAMAD ZULKIFLY BIN JUSOH, TIMBALAN PENDAFTAR MAHKAMAH TINGGI, JOHOR BAHRU

PERINTAH

Atas permohonan Defendan bertarikh 29hb Ogos 1998 (Kandungan 11) diperdengarkan pada hari ini di hadapan Timbalan Pendaftar, Mahkamah Tinggi, Johor Bahru, dalam kehadiran Cik Gan Jui Chui peguam Defendan dan ketidakhadiran Plaintif dan/atau peguam Plaintif **DAN SETELAH MEMBENARKAN** permohonan lisan Cik Gan peguam Defendan tersebut untuk meminda perenggan (b) Kandungan 11 kepada "(b) Faedah pada kadar 8% setahun dikira dari 28-7-1997 sehingga tarikh penjelasan penuh" **DAN SETELAH MEMBACA** permohonan Defendan (Kandungan 11), Afidavit Sokongan Teok Ah Kow @ Cheong Chan yang diikrarkan pada 28-8-1998, Afidavit Jawapan Ng Hong Chai yang diikrarkan pada 23-9-1998 dan Afidavit Defendan (No. 2) Teok Ah Kow @ Cheong Chan yang diikrarkan pada 7-10-1998

ADALAH DIPERINTAHKAN BAHAWA:

(a) Penghakiman terhadap Plaintif untuk RM300,000-00 menurut Aturan 14 Kaedah-kaedah Mahkamah Tinggi 1980;

(b) Faedah pada kadar 8% setahun dikira dari 28-7-1997 sehingga tarikh penjelasan penuh;

(c) Kos.

Bertarikh pada 2 haribulan Nov 1998.

Sgd.
PENOLONG KANAN PENDAFTAR
MAHKAMAH TINGGI
JOHOR BAHRU

Perintah ini difailkan oleh Tetuan Gan & Lim, peguamcara bagi Defendan yang beralamat di No. 61, Jalan Tan Hiok Nee, 80000 Johor Bahru, Johor [C98194(5)]

Dissatisfied with the decision of the learned DR, the appellant filed a summons in chambers in encl. 25 on 18 November 1998 seeking: (1) to set aside the order of the learned DR dated 2 November 1998; (2) to stay the proceedings pending the disposal of the appellant's application in encl. 25; (3) costs to be borne by the appellant; and (4) any other relief which this court deems fit and suitable. Enclosure 25 was supported by an affidavit in encl. 24 of Sabita Gomez EC Janardanan ("Sabita") that was affirmed on 16 November 1998 and filed on 18 November 1998. Sabita deposed the affidavit as the clerk of Messrs

A Singh & Partners, solicitors for the appellant, and she deposed it according to the facts that came to her knowledge. Sabita deposed that on 26 September 1998 Messrs A Singh & Partners received two letters dated 25 September 1998 from Messrs Gan & Lim. According to her the first letter enclosed a copy of the statement of defence and the amended counterclaim while the second letter enclosed a copy of the summons in chambers. Sabita then deposed that it was due to her mistake that she failed to record the date of the hearing of the summons in chambers – referring no doubt to encl. 11, in the court diary of Mr. Awtar Singh, learned counsel for the appellant. Mr. Awtar Singh himself in encl. 23 affirmed an affidavit on 16 November 1998 which was filed on 18 November 1998 and there he introduced himself as the counsel for the appellant and that he was authorised to affirm the affidavit and that all the facts stated therein were within his personal knowledge save as otherwise stated. To begin with, he referred to the order of the learned DR dated 2 November 1998 and he continued in serious vein. He deposed to the following facts:

(1) that on 25 June 1998 on the instructions of the appellant he filed civil suit no: 22-354-1998 in High Court (No. 1) of Johor Bahru and the sealed copy was served on the respondent on 28 July 1998;

(2) on 31 July 1998 Messrs Gan & Lim filed a memorandum of appearance on behalf of the respondent;

(3) by 20 August 1998 the respondent failed to file the statement of defence and his law firm had, on 20 August 1998, sent a letter to Messrs Gan & Lim for them to file the statement of defence;

(4) on 20 August 1998 his law firm received a letter and a copy of the statement of defence, together with the counterclaim dated 14 August 1998 (here it was alleged that it was back-dated to 14 August 1998) but till to date his law firm had not been served with the sealed copy of his statement of defence and the counterclaim;

(5) on 27 August 1998 his law firm received a copy of the amended statement of defence and counterclaim from Messrs Gan & Lim;

(6) subsequently on 3 September 1998 his law firm had filed a defence to the counterclaim and a sealed copy thereof had been served on 26 September 1998;

(7) on 26 September 1998 his law firm received two letters from Messrs Gan & Lim, one enclosing the amended statement of defence and

counterclaim while the other enclosing a sealed copy of the summons in chambers – referring to encl. 11, that was fixed for hearing on 2 November 1998;

(8) because of the mistake of his clerk, the date for the hearing of the summons in chambers (encl. 11) was not recorded in his court diary;

(9) on 2 November 1998 he attended the magistrate's court (B) at Johor Bahru for the hearing of arrest case no: B83-940-1995-B and also the magistrate's court (A) for the mention of summons no: 73-762-1996-A;

(10) when he returned to his office, he was informed by his clerk that because of her mistake the date for the hearing of the summons in chambers in encl. 11 was not recorded in his court diary and so the related court file was not handed to him for him to attend court at the High Court, Johor Bahru;

(11) he had advised his clerk to affirm an affidavit and a copy of his clerk's affidavit was enclosed and marked as exh. "AS 4"; and

(12) he verily believed that the appellant had merit in his claim in this action against the respondent as the sum of RM637,659.84 represented the price of 300,000 shares in Polypulp Industries Bhd that had not been received by the appellant even though the scripts have been handed over to the respondent.

For these reasons, Mr. Awtar Singh deposed and craved this court to allow his application in encl. 25.

The respondent did not remain silent. He quickly affirmed an affidavit in reply in encl. 33 on 28 November 1998 and this enclosure served as a response to encls. 23 and 24. The respondent deposed in encl. 33 that what he proposed to depose was true and according to his own personal knowledge save as otherwise stated. He drew the court's attention to the affidavits of Sabita in encl. 24 and the affidavit of Mr. Awtar Singh in encl. 23 together with the order of the learned DR dated 2 November 1998. He then pointed out that the date for the hearing of the summons in chambers in encl. 11 had been conveyed to Messrs A. Singh & Partners by letter dated 7 October 1998 as seen in exh. "TAK 1" – incidentally this very letter had been reproduced in the early part of this judgment. He then deposed that the affidavit of Mr. Awtar Singh in encl. 23 contained averments which were confusing and were not precise and not relevant to the orders sought in encl. 11. The orders sought in encl. 11 were said to be:

(a) that the order dated 2 November 1998 that was filed by the respondent through the respondent's counsel Messrs Gan & Lim be set aside;

(b) that all execution proceedings in this civil suit be stayed pending hearing of the appellant's application in encl. 11.

The respondent deposed that the averments by Mr. Awtar Singh in paras. 3, 4, 5, 6, 7 and 8 of encl. 23 were irrelevant. These paragraphs have been reproduced earlier as paras. 1, 2, 3, 4, 5 and 6 in the course of narrating the averments of Mr. Awtar Singh in encl. 23. The respondent reiterated that the date for the hearing of encl. 11 had been conveyed to the appellant's counsel and the respondent believed that the mistake of the clerk was not a ground that can be considered as reasonable. The respondent further deposed that the averment by Mr. Awtar Singh in para. 14 in encl. 23 was misleading because the order of the learned DR on 2 November 1998 was an order against the appellant in regard to RM300,000 that comprised and constituted the counterclaim of the respondent against the appellant. The counterclaim stood independently from the cause of action instituted by the appellant against the respondent. It was deposed that the appellant failed to disclose that they had failed to file an affidavit in reply to the respondent's affidavit that was affirmed on 7 October 1998 as reflected in encl. 17. The respondent verily believed that the appellant had no defence to the counterclaim. The respondent deposed that he had no personal knowledge in regard to the affidavit affirmed by Sabita and the latter failed to disclose that the date of hearing on 2 November 1998 was clearly stated in the letter of Messrs Gan & Lim dated 7 October 1998 and marked as exh. "TAK 1". It was deposed that the appellant failed to disclose any solid ground to support the appellant's application in encl. 25 and, consequently, it was deposed that encl. 25 should be dismissed with costs.

Just like encl. 17, there was also no reply to encl. 33. On 24 February 1999 the senior assistant registrar ("SAR") dismissed encl. 25 with costs. Hence, the present appeal before me in encl. 36. Basically, the counterclaim sought for the return of RM300,000 that was extended by the respondent to the appellant by way of a friendly loan. The expression "friendly loan" appeared in the amended statement of defence and counterclaim in encl. 8 especially para. 8 thereof and the averments in the counterclaim matched the averments in encl. 10. The defence to the counterclaim contained precious little and this can be seen in encl. 13. The defence to the counterclaim categorically denied and put the respondent to strict proof thereof. In regard to the four cheques the defence went like this:

> That the appellant had given the cheques to the respondent and those cheques were undated and the accounts were closed in 1995 and the respondent knew about this.

Thus, there was an admission by the appellant that the four cheques were given to the respondent. But the respondent did not know that these four cheques were worthless because the respondent presented those cheques for payment on 28 July 1997 and those cheques were then returned with the caption "account closed" – this was pleaded in the counterclaim and repeated in encl. 10 – the affidavit in support of the O. 14 application. The scenario was simply this: a friendly loan of RM300,000 was extended but not repaid. It was emphasised that there was no written agreement between the parties in relation to that friendly loan. But this was amply answered in encl. 15 which enclosure was not replied upon by the appellant at all. Now, there are two types of contracts: formal or informal. Formal contracts may be reduced in writing while all others are said to be informal. To put it bluntly, contracts may be in oral form or in writing (*Rann v. Hughes* [1778] 7 TR 350). The crucial question to ask would be this: was there a contract between the appellant and the respondent. As VC George J remarked in *Sri Kajang Rock Products Sdn Bhd v. Mayban Finance Bhd* [1992] 1 CLJ 204, 206:

> To constitute a valid contract there must be separate and definite parties thereto; those parties must be in agreement, that is there must be consensus *ad idem*; those parties must intend to create legal relations in the sense that the promises of each side are to be enforceable simply because they are contractual promises and the promises of each party must be supported by consideration.

In my judgment, there was an oral contract between the appellant and the respondent. The appellant was certainly liable, not because he has made a promise, but because he has made a bargain. As a contracting party, the appellant was bound because he has agreed to be bound when he accepted the sum of RM300,000 from the respondent. If it was argued, as did the appellant here, that there was no contract at all then one may ask: why did the appellant hand the four cheques to the respondent? It must be borne in mind that an agreement is not a mental state but rather an act. As an act, this court can certainly make the necessary inference and that inference must necessarily be an inference from conduct. The parties must be judged, not by what is in their minds, but rather by what they have said or written or done. Chief Justice Brian in *Anon* [1477] YB Edw 4, fo 1, pl 2, once remarked:

> ... that the intent of a man cannot be tried, for the Devil himself knows not the intent of a man.

Indeed my function is not to seek and satisfy some elusive mental element but rather to ensure, as far as practical experience permits, that the reasonable expectations of honest men are not disappointed. In short, the law adopts an objective test to ascertain whether the parties have entered an agreement – be it oral or written (*Centrovincial Estates pk v. Merchant Investors Assurance*

Co Ltd [1983] Com LR 158, CA). Chang Min Tat FJ (as he then was) in *Re Haji Mohamed Eusoff, Decd. Kok Su Win v. Ng Koon Mee* [1981] 2 MLJ 77 at 78 remarked:

> It is basic law that a contract is formulated by offer and acceptance and not by intention.

and, to me, this observation connotes an objective manifestation as opposed to a subjective speculation. The manifestation of this objective test has been codified in the Contracts Act 1950 particularly s. 3 thereof which enacts as follows:

> The communication of proposals, the acceptance of proposals, and the revocation of proposals and acceptances, respectively, are deemed to be made by any act or omission of the party proposing, accepting, or revoking, by which he intends to communicate the proposal, acceptance, or revocation, or which has the effect of communicating it.

Sir Garfield Barwick in *Daiman Development Sdn Bhd v. Mathew Lui Chin Teck & Anor Appeal* [1981] 1 MLJ 56, 58, aptly said:

> The question whether the parties have entered into contractual relationships with each other essentially depends upon the proper understanding of the expressions they have employed in communicating with each other considered against the background of the circumstances in which they have been negotiating, including in those circumstances the provisions of any applicable law. Where they have expressed themselves in writing the proper construction of the writing against that background will answer the question.

BTH Lee J in *MN Guha Majumder v. RE Donough* [1974] 2 MLJ 114 at 117 observed:

> The law, it seems to me, does not impute intention to enter into such a legal relationship as that of vendor and purchaser where the circumstances and the conduct of the parties negative any intention of the kind.

Under s. 2(e) of the Contracts Act 1950, an "agreement" consists of "every promise and every set of promises, forming the consideration for each other", while under s. 2(h) of the Contracts Act 1950, a "contract" is said to be "an agreement enforceable by law" (*Hing Moh Sdn Bhd v. Perdana – CMCC Sdn Bhd* [1994] 4 CLJ 128 at 132 and *Baltim Timber Sdn Bhd v. Director of Forests & Ors* [1996] 4 MLJ 103 at 106).

There was no defence to the counterclaim at all. Those four cheques bounced and by supplying those four cheques, the appellant knew that he owed on the basis of a friendly loan a sum of RM300,000 to the respondent. Order 14 r. 5(1) of the RHC gives an unfettered right to the respondent to apply for

summary judgment on the counterclaim. The counterclaim is an independent action. It gives the respondent a similar right to apply for summary judgment under O. 14 against the appellant.

From the factual matrix of the present case there was certainly a contract between the respondent and the appellant. That contract as I said can easily be inferred from the conduct of the parties. An acceptance by one party of an offer made to him by the other party may be inferred from the words or documents that have passed between them or may be inferred from their conduct. That there was an acceptance of the friendly loan by the appellant can never be doubted. There was damning conduct on the part of the appellant.

Must I accede to the appeal of the appellant in encl. 36? In my judgment, the SAR was right when he dismissed encl. 25 with costs. There was no necessity to set aside the order of the learned DR dated 2 November 1998. What the learned DR did was allowable in law and it was done above board. There was no material at all to show that there was a defence to the counterclaim. Likewise there was no material at all to set aside the order of the learned DR dated 2 November 1998. This was my judgment and I so hold accordingly.

Sharma J in *Packirisamy v. Janagi* [1970] 2 MLJ 202 once remarked at p. 203 of the report:

> I am furthermore of the view that every opportunity should be given to the litigants to put forward their cases and that they have a right to be heard within the limits prescribed by law if they do not violate any of the principles of procedure that the law has laid down.

but when the absence of Mr. Awtar Singh was due to the mistake of his clerk, this court cannot show any mercy. Lawyering has never been an easy job. It is a demanding job which requires alertness of mind and body. It would be prudent for litigation lawyers to sieve through their mails on a daily basis lest they be caught off guard. Professionalism involves diligence and diligence will give rise to success. I have asked myself whether there was evidence disclosing a *prima facie* defence to the counterclaim or, in other words, a defence on the merits. For this exercise, the appellant must disclose an arguable or triable issue: *Drayton Giftware Ltd v. Varyland Ltd* [1982] 132 NLJ 558. In short, the appellant need only show an arguable case which ought to go for trial. I have perused through the affidavits, the counterclaim and the defence to the counterclaim but I could not find a single argument or a triable case that ought to compel me to order a trial. There was none. This was a case of a friendly loan that was not repaid. This was a case where the appellant by conduct – in giving the four bounced cheques, tied his neck to the noose. There was no defence at all to the counterclaim.

In seeking to set aside the order of the learned DR dated 2 November 1998 as reflected in encl. 25, the appellant did not affirm a single affidavit in support thereto. I say that in matters where disputed questions of facts are involved, it would be prudent for the parties and not their solicitors or any one else to affirm affidavits relating thereto (*Million Group Credit Sdn Bhd v. Lee Shoo Khoon & Ors* [1986] 1 MLJ 315). That being the case, Sabita's affidavit in encl. 24 and Mr. Awtar Singh's affidavit in encl. 23 did not have the sting to support encl. 25 at all.

In regard to the stay that was sought for in encl. 25, I did say in *Wu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) v. Raja Zainal Abidin bin Raja Hussin & Anor* [1995] 3 MLJ 224, 228 and which should be the guiding principle to be applied and when so applied the stay should be refused outright. In that case, I said:

> The general proposition that the court will not deprive a successful party of the fruits of his litigation until an appeal is determined, unless the unsuccessful party can show special circumstances to justify it, must be vigorously applied to *Raja Zainal Abidin (Serangoon Garden Estate Ltd v. Ang Keng* [1953] MLJ 116; *The Annot Lyle* [1886] 11 PD 114; and *Syarikat Berpakat v. Lim Kai Kok* [1983] 1 MLJ 406).

In my judgment there were no special circumstances to stay the proceedings. The respondent was entitled to enjoy his success. Surprisingly, when the chips are down and the passage ways are getting narrower, Mr. Awtar Singh quite magnanimously threw in his towel and conceded that he was going on an uphill task and he, in fine style, submitted that encl. 36 should be dismissed with costs. I then, unhesitatingly, dismissed encl. 36 with costs.

I would like to place on record that the learned counsel for the respondent in the person of Miss Gan Jui Chui performed extremely well at the bar – an excellent advocate and solicitor that should be a source of pride to the Johor Bar.